

amusement or recreational establishments, hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. These establishments were exempt if they met the basic 50 percent in State sales test and the 75 percent retail sales test of section 13(a)(2). The 1966 amendments to the Act repealed sections 13(a)(2)(ii) and (iii). Now to be exempt under section 13(a)(2) hotels, motels, and restaurants must meet the same tests as other retail or service establishments (see § 779.337). Seasonal amusement or recreational establishments and motion picture theaters now have special exemptions from both the minimum wage and overtime pay provisions of the Act as provided by the 1966 amendments in sections 13(a)(3) and 13(a)(9) respectively.

(b) Certain establishments which were previously exempt under section 13(a)(2) prior to the 1966 amendments have been specifically excluded from this exemption as a result of the amendments, even though they may still qualify as retail or service establishments under the definition of such an establishment in that section. These are hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. However, such institutions have been recognized as having a retail concept and where the nature of their operations has not changed and where they otherwise satisfy the Act's definition of a "retail or service establishment", certain food service employees employed by such institutions will be considered to be exempt from the Act's overtime pay provisions under section 13(b)(18), exemptions for their administrative or executive employees will not be defeated by nonexempt work occupying less than 40 percent of the employee's time, and full-time students may be employed in accordance with the special minimum wage provisions of section 14 of the Act and part 519 of this chapter.

#### SALES MADE WITHIN THE STATE

##### **§ 779.339 More than 50 percent intra-state sales required.**

The first test specified in section 13(a)(2) is that more than 50 percent of the sales of goods or of services (or of both) of a "retail or service establishment" (Measured by annual dollar volume) must be made "within the State in which the establishment is located". This limitation means that such establishment must be primarily engaged (more than 50 percent) in selling to or serving customers within its State. If the establishment is engaged to the extent of 50 percent or more in selling to or serving customers outside the State of its location, the requirement is not met and the establishment cannot qualify for exemption.

##### **§ 779.340 Out-of-State customers.**

Whether the sale or service is made to an out-of-State customer is a question of fact. In order for a customer to be considered an out-of-State customer, some specific relationship between him and the seller has to exist to indicate his out-of-State character. Sales made to the casual cash-and-carry customer of a retail or service establishment, who, for all practical purposes, is indistinguishable from the mass of customers who visit the establishment, are sales made within the State even though the seller knows or has reason to believe, because of his proximity to the State line or because he is frequented by tourists, that some of the customers who visit his establishment reside outside the State. If the customer is of that type, sales made to him are sales made within the State even if the seller knows in the particular instance that the customer resides outside the State. On the other hand, a sale is made to an out-of-State customer and, therefore, is not a sale made "within the State" in which the establishment is located, if delivery of the goods is made outside the State. It should be noted that sales of goods or services that are conditioned upon acceptance or rejection by an out-of-State source are interstate sales and not sales made within the State for purposes of section 13(a)(2). For example, a contract entered into in the

State where the customer resides for the delivery of a magazine to the customer's residence, is an interstate sale if the contract must be approved by the out-of-State home office of the company publishing the magazine before it becomes effective.

**§ 779.341 Sales “made within the State” and “engagement in commerce” distinguished.**

Sales to customers located in the same State as the establishment are sales made “within the State” even though such sales may constitute engagement in interstate commerce as where the sale: (a) Is made pursuant to prior orders from customers for goods to be obtained from outside the State; (b) contemplates the purchase of goods from outside the State to fill a customer's order; or (c) is made to a customer for use in interstate commerce or in production of goods for such commerce.

COMPUTING ANNUAL DOLLAR VOLUME  
AND COMBINATION OF EXEMPTIONS

**§ 779.342 Methods of computing annual volume of sales.**

The tests as to whether an establishment qualifies for exemption under section 13(a)(2) of the Act are specified in terms of the “annual dollar volume of sales” of goods or of services (or both) and percentages thereof. The “annual dollar volume of sales” of an establishment consists of the gross receipts from all sales of the establishment during a 12-month period. The methods of computing it for purposes of determining whether the establishment qualifies under the tests of the exemption are the same as the methods of calculating whether the annual gross volume of sales or business of an enterprise or an establishment meets the statutory dollar tests for coverage. These are discussed in §§ 779.265 to 779.269. However, for purposes of the exemption tests the specified percentages are based on annual dollar volume before deduction of those taxes which are excluded in determining whether the \$250,000 test is met. The exemption tests are in terms of the annual dollar volume of the establishment. This will include dollar volume from transactions with other establishments in

the same enterprise, even though such transactions within an enterprise may not be part of the annual gross volume of the enterprise's sales made or business done (see § 779.259).

**§ 779.343 Combinations of exemptions.**

(a) An employee may be engaged in a particular workweek in two or more types of activities for each of which a specific exemption is provided by the Act. The combined work of the employee during such a workweek may not satisfy the requirements of either exemption. It is not the intent of the Act, however, that an exemption based on the performance of one exempt activity should be defeated by the performance of another activity which has been made the basis of an equivalent exemption under another provision of the Act. Thus, where an employee during a particular workweek is exclusively engaged in performing two or more activities to which different exemptions are applicable, each of which activities considered separately would be an exempt activity under the applicable exemption if it were the sole activity of the employee for the whole workweek in question, as a matter of enforcement policy the employee will be considered exempt during such workweek. If the scope of such exemptions is not the same, the exemption applicable to the employee will be equivalent to that provided by whichever exemption provision is more limited in scope.

(b) In the case of an establishment which sells both goods and services at retail and which qualifies as an exempt establishment under section 13(a)(2), but cannot, as a whole, meet the tests of section 13(a)(4) because it sells services as well as goods, a combination of section 13(a)(2) and 13(a)(4) exemptions may nevertheless be available for employees of the establishment who make or process, on the premises, goods which it sells. Such employees employed by an establishment which, as a whole, meets the tests set forth in section 13(a)(2), will be considered exempt under this combination exemption if the establishment, on the basis of all its activities other than sales of services, would meet the tests of section 13(a)(4).